No. 89-1958

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COLOWYO COAL COMPANY,
PEABODY COAL COMPANY, *et al.*,

Petitioners,

v.

MANUEL LUJAN, JR.,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES L. KAISER
(Counsel of Record)
D.D. MALLARD
DAVIS, GRAHAM & STUBBS
P.O. Box 185
Denver, CO 80201
(303) 892-9400

JOHN F. SHEPHERD
KENNETH D. HUBBARD
HOLLAND & HART
P.O. Box 8749
Denver, CO 80201
(303) 295-8000

Counsel for Petitioners

Dated: June 7, 1990

QUESTIONS PRESENTED

I. SHOULD THE COURT REVIEW A COURT OF APPEALS DECISION THAT ESTABLISHES A NEW LEGAL PRINCIPLE FOR FEDERAL CONTRACTS THAT CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS AND OTHER COURTS AND THAT CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW?

II. SHOULD THIS COURT REVIEW A COURT OF APPEALS DECISION THAT CONFLICTS WITH THE MINERAL LEASING ACT OF 1920 AND THAT RAISES THE IMPORTANT FEDERAL QUESTION HOW HUNDREDS OF FEDERAL COAL LEASES ARE TO BE READJUSTED?

III. SHOULD THE COURT REVIEW A COURT OF APPEALS DECISION THAT CONFLICTS WITH PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND JUST COMPENSATION BY CONVERTING THEIR INDETERMINATE FEDERAL COAL LEASES THAT MAY BE READJUSTED AS NECESSARY TO MEET MATERIALLY CHANGED CONDITIONS INTO PREFERENTIAL RIGHT LEASES THAT GRANT LESSEES A RIGHT OF FIRST REFUSAL TO ACCEPT WHATEVER TERMS, IF ANY, THE SECRETARY WISHES TO IMPOSE?

IV. SHOULD THE COURT REVIEW A COURT OF APPEALS DECISION ON WHEN FEDERAL COAL LEASES MAY BE READJUSTED THAT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THE DEPARTMENT OF THE INTERIOR AND THAT CONSTITUTES AN IMPORTANT FEDERAL QUESTION?

PARTIES

The parties to this case are Colowyo Coal Company; Peabody Coal Company; North Antelope Coal Company; Powder River Coal Company; and Manuel Lujan, Jr., Secretary of the United States Department of the Interior. The City of Colorado Springs, Colorado; Central Power & Light Company; and Colorado-Ute Electric Association, Inc. participated as *amici curiae* in the proceeding below. Related parties, as defined by Rule 29.1, are W.R. Grace & Co; M.A. Hanna Co.; Trinity Mining Company; Peabody Holding Company, Inc.; Newmont Third Capital Corporation; HM Holdings, Inc.; Newmont Mining Corporation; and Hanson PLC.

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Colowyo Coal Company ("Colowyo"), Peabody Coal Company, North Antelope Coal Company, and Powder River Coal Company ("Peabody") respectfully petition the Court for a writ of certiorari to review the District of Columbia Circuit Court of Appeals' judgment in this proceeding.

OPINIONS BELOW

The District of Columbia Circuit's opinion, reproduced at Appendix A, is reported at 895 F.2d 780. The opinion of the District Court for the District of Columbia, reproduced at Appendix B, is unreported.

JURISDICTION

The ~~District~~ of Columbia Circuit's judgment was entered on February 9, 1990. Chief Justice Rehnquist entered an order on May 1, 1990 granting petitioners an extension of time through June 7, 1990 to file their petition. The Court's jurisdiction to review the District of Columbia Circuit's judgment rests on 28 U.S.C. § 1251(1) (1988).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

I. Section 7 of the Mineral Leasing Act of 1920, 41 Stat. 439, in effect when the Department of the Interior issued petitioners' federal coal leases, provided in pertinent part:

> Leases shall be for indeterminate periods upon condition . . . that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

30 U.S.C. § 207 (1970).

II. Section 6 of the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1087, in effect when the Department of the Interior last readjusted petitioners' federal coal leases, provided in pertinent part:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated . . . . A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations . . . . Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. § 207(a) (1988).

III. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Mineral Leasing Act of 1920. After six years of sustained debate and withdrawal of certain minerals from entry on the public lands, Congress enacted the Mineral Leasing Act of 1920, 41 Stat. 439. Under that statute, as amended, the respective rights and obligations of the federal government and federal lessees varied substantially depending on the mineral to be leased. For minerals such as oil and gas, the Secretary of the Interior was authorized to grant "determinate leases"; such leases may be extended beyond their fixed "primary term" without any opportunity for modification if oil and gas is produced in paying quantities. *See, e.g.,* 30 U.S.C. § 226(e) (1988). For minerals such as sodium and phosphates, the Secretary of the Interior was authorized to grant "preferential rights leases"; such leases may be extended beyond their fixed term only if lessees accept whatever lease terms and conditions, if any, the Secretary wishes to impose. *See, e.g.,* Solicitor's Opinion M-36993, 89 I.D. 773 (1982); 30 U.S.C. § 262 (1988); 30 U.S.C. § 212 (1988). For coal, the Secretary of the Interior was authorized to issue "indeterminate leases"; such leases are without a fixed or "primary term," remain in effect until a coal deposit is mined out, and may be "readjusted" at periodic intervals as necessary "to meet materially changed conditions." *See, e.g.,* 30 U.S.C. § 207 (1970); pp. 6-7, *infra*.

The rationale for the unique treatment afforded coal is articulated in the legislative history of the Mineral Leasing Act of 1920. To provide federal coal lessees with the long-term security Congress believed was necessary given the inherent risk and capital-intensive character of the coal mining industry; the anticipated price fluctuations for coal over the long life of a mine; and the substantial periods required to finance operations, to equip a mine, to obtain contracts to market coal, and to mine out a coal deposit:

> the leasing periods provided for in the bill are indeterminate so that lessees may be willing to expend the money necessary for the thorough equipment of a large mine.

51 Cong. Rec. 14,945 (1914) (Statement of Rep. Thomson). Congress also recognized, however, that the relative positions of the federal government and federal lessees could change over the indeterminate life of the lease and, consequently, authorized the Secretary to "readjust" lease terms at periodic intervals:

> provision is made in the bill, however, for such an adjustment of the terms and conditions of the leases at the end of 20-year periods as may meet materially changed conditions.

51 Cong. Rec. 14,945 (1914). The dual policies of long-term security and fairness to the parties would be achieved, in Congress' view, by granting the Secretary authority to:

> adjust each case according to the conditions that are present, having due regard for markets, transportation, and other conditions.

H.R. Rep. No. 17, 64 Cong., 1st Sess. 3, 4 (1916); H.R. Rep. No. 668, 63 Cong. 2nd Sess. 3, 4 (1914).

Lease Issuance and Development. The Secretary of the Interior issued hundreds of federal coal leases under authority of the Mineral Leasing Act of 1920. As of 1986, 489 coal leases issued under that authority were outstanding. *See*, *e.g.*, U.S. Congress, Office of Technology Assessment, "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976 - A Special Report," p. 31 (Government Printing Office, Washington D.C., March 1986). These leases embrace almost all of the nearly 1 million acres of lands in 14 states subject to federal coal leases. *See*, *e.g.*, Public Land Statistics -- 1988, pp. 64-65 (U.S. Dept. of the Interior, March 1989). Billions of dollars have been spent by coal companies and public utilities to develop that coal.

The circumstances that prevail here are representative. The Colowyo lease, for instance, was issued in 1924 and the Peabody leases were issued in the 1960s. *See* Joint Appendix in the Court of Appeals proceeding at 10-13, 34-43, 73-76, 98-100, and 123-125. In reliance on the stability Congress afforded federal coal lessees when it enacted the Mineral Leasing Act of 1920, Colowyo and Peabody have spent well over $150 million in capital expenditures and presently employ hundreds of workers to

mine coal from the leases that are before the Court. *See* Joint Appendix in the Court of Appeals proceeding at 177-178. The coal mines that are supported by the Colowyo and Peabody leases that are at issue here produce millions of tons of coal each year used to generate electricity for hundreds of thousands of consumers in the southern and western United States. *Id.*

Federal Coal Leasing Amendments Act ("FCLAA"). Congress enacted FCLAA, Pub. L. 94-377, 90 Stat. 1083, in 1976. FCLAA vested the Secretary with authority to issue federal coal leases (i) that, like "determinate" oil and gas leases, are issued for a "primary" rather than an "indeterminate" period and terminate by operation of law if they are not producing at the end of ten years, (ii) that, like "indeterminate" coal leases issued under the Mineral Leasing Act of 1920, may be readjusted, and (iii) that bear royalties of not less than 12-1/2 percent for coal mined by surface methods. *See* FCLAA Section 6, 30 U.S.C. § 207(a) (1988). FCLAA Section 6, unlike other FCLAA sections, (i) does not expressly apply to coal leases issued before its enactment and (ii) no longer provides that readjustment of lease terms is to be made as the Secretary may determine "unless otherwise provided by law at the time of the expiration of such period." *Id.*

Readjustment. For each lease before the Court, the Secretary, acting through the Bureau of Land Management, forwarded Colowyo and Peabody "Notices of Proposed Readjusted Lease Terms and Conditions" ("Proposed Terms") before the end of the leases' 20-year readjustment period. Colowyo and Peabody filed timely objections to the Proposed Terms on the grounds that the Secretary was required to examine materially changed conditions and to establish lease terms that reflected those conditions. After the time for readjustment had passed, the Secretary rejected petitioners' objections and issued "Final Readjustment Lease Terms and Conditions" ("Final Terms") that, among other things, increased royalties payable to the federal government by nearly 2000 percent in some cases. Petitioners appealed.

The Court of Appeals' Decision. The District Court for the District of Columbia, invoking its federal question jurisdiction under 28 U.S.C. § 1331 (1988), affirmed the Secretary's action. The District of Columbia Circuit Court of Appeals also affirmed. The Court of Appeals did not consider that petitioners had been granted indeterminate leases that could be readjusted only as necessary to meet materially changed conditions. Instead, it examined in isolation statutory and lease terms that reserve the federal government the right to readjust leases at a specified time "unless otherwise provided by law at the time of expiration of such period"; found that provision to be ambiguous; and, relying on the Court's opinion in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*Bowen*"), held that petitioners' federal lease contracts did not constitute "property" and could be

modified "to avoid foreclosing exercise of sovereign authority." App. A, 17a-19a. The Court of Appeals also held that the Secretary had timely readjusted petitioners' leases and that his actions were not inconsistent with petitioners' constitutional rights. App. A, 20a-22a.

REASONS FOR GRANTING CERTIORARI

I. THE COURT OF APPEALS' DECISION ESTABLISHES A NEW LEGAL PRINCIPLE FOR CONTRACTS TO WHICH THE FEDERAL GOVERNMENT IS A PARTY THAT CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS AND OTHER COURTS AND THAT CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

This Court has long held that the federal government has the power to enter into contracts that confer vested rights on the contracting parties. *See, e.g., Bowen*, 477 U.S. at 52; *Perry v. United States*, 294 U.S. 330, 351-353 (1935) ("*Perry*"); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Lynch"). When the federal government enters into a contract, it is as bound as are private parties and its rights and duties are governed by the same rules applicable to contracts between private parties. *See, e.g.*, *Perry*, 294 U.S. at 351, 356; *Lynch*, 294 U.S. at 579; *Sinking Fund Cases*, 99 U.S. 700, 718-719 (1879). Federal mineral leases are contracts that must be interpreted under "typical contract law doctrines applicable to commercial transactions." *See, e.g.*, *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982) ("*Rosebud*"); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("*Sun Oil Co.*"); *Union Oil Co. of California v. Morton*, 512 F.2d 743, 747 (9th Cir.

1975) ("*Union Oil Co.*"). Chief among those "typical contract law doctrines" are (i) that contracts must be fairly construed to give effect to the intentions of both the federal government and private contract parties, as reflected by the "business context" in which the contract arose and "[t]he circumstances relative to issuance of the lease in question, the milieu in which lease performance was to take place, and the . . . concerns implicit in the totality of the federal leasing program," *Rosebud*, 667 F.2d at 951; *Sun Oil Co.*, 572 F.2d at 802, and (ii) that contracts should be "construed most strongly against the drafter," even when the drafter is the federal government, *United States v. Seckinger*, 397 U.S. 203, 210, 216 (1970). Applying these principles Courts of Appeals have held that federal mineral leases are contracts that grant lessees vested property rights. *See, e.g.*, *Rosebud*, 667 F.2d at 951; *Union Oil Co.*, 512 F.2d at 747.

The Court of Appeals disregarded all of these settled legal principles. It refused to consider "typical contract law doctrines." It refused to consider the property rights with which mineral lessees are vested. Instead, the Court of Appeals held that when a contract to which the federal government is a party is deemed ambiguous, that contract must be interpreted as reserving in Congress the unrestricted right to change any term or condition of the contract in exercise of its "sovereignty" and as granting no vested rights in private parties. App. A, 17a-19a. The new rule announced by the Court of Appeals -- a rule applicable to all federal contracts, be they mineral leases, procurement agreements, or whatever -- will undermine the law of federal government contracts by essentially binding

private parties but leaving the federal government free to modify those contracts through Congressional action.

In support of its new rule the Court of Appeals relied solely on this Court's decisions in *Bowen*, 477 U.S. at 41 and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) ("*Merrion*"). That reliance is misplaced. In *Bowen* the Court held that Congress reserved the right to alter a State's participation under the Social Security Act of 1935 because (i) Congress expressly and unambiguously reserved the right "to alter, amend, or repeal any provision of" the Social Security Act and (ii) the purpose and structure of the Social Security Act demonstrated recognition that Congress would be required to modify the Social Security system to meet workers' needs given changing social and economic conditions. *Bowen*, 477 U.S. at 44, 51. Here the Mineral Leasing Act of 1920 manifestly does not expressly and unambiguously reserve in Congress the right to alter or amend the Act and lease terms, as the Court of Appeals recognized in finding that the statute was at best ambiguous; the Mineral Leasing Act's statutory scheme, unlike that of the Social Security Act, does not reflect recognition that Congressional modification will be required; the federal government's broad power to act in the social welfare area cannot be compared to its power to affect existing mineral leases to which it is a party, as reflected by the Court's holding that the language at issue in *Bowen* was "hardly the language of contract," *National Railroad Passenger Corp. v. Atchison, Topeka, and Santa Fe Railway Co.*, 470 U.S. 451, 467 (1985); and the circumstances that prevail here fall squarely within *Bowen's* reservation that "the federal government, as sovereign, has

the power to enter into contracts that confer vested rights, and *the concomitant duty to honor those rights.*" *Bowen*, 477 U.S. at 52 (emphasis added). In *Merrion* the Court held that an Indian Tribe's grant of an oil and gas lease did not foreclose its right to impose a severance tax where both the Indian Mineral Leasing Act and the leases issued under that authority were silent on the question of the Tribe's authority to impose the tax. *Merrion*, 455 U.S. at 130. Here petitioners rely on the Mineral Leasing Act of 1920 and the terms of their leases to establish the scope of the federal government's right to readjust; they neither rely on inference nor challenge the government's authority to act in collateral areas. In short, the new rule fashioned by the Court of Appeals finds no support in *Bowen* or *Merrion*.

The Court of Appeals' decision announces a new rule for federal government contracts. That rule flies in the face of (i) federal government contract principles established by this Court and (ii) the holdings of other Courts of Appeals that federal mineral leases are contracts that grant lessees property rights. The Court should grant certiorari, reestablish federal government contract principles, and hold that federal mineral leases grant lessees valuable property rights that cannot be casually usurped.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE MINERAL LEASING ACT OF 1920 AND RAISES THE IMPORTANT FEDERAL QUESTION HOW HUNDREDS OF FEDERAL COAL LEASES ARE TO BE READJUSTED.

When it enacted the Mineral Leasing Act of 1920, Congress recognized that a *sine qua non* for federal coal development was providing lessees long-term security. *See* pp. 6-7, *supra*. Consequently, the Mineral Leasing Act of 1920 provided for grant of a unique "indeterminate" lease. *Id.* Congress recognized, however, that because indeterminate leases could remain outstanding for scores of years, the relative positions of the federal government and lessees would likely change over time. *Id.* Accordingly, the Mineral Leasing Act of 1920 provided that the federal government could readjust lease terms at periodic intervals to reflect "materially changed conditions" as necessary to "adjust each case according to the conditions that are present, having due regard for markets, transportation, and other conditions." *Id.* Under the Mineral Leasing Act of 1920, the grant of indeterminate leases and the reservation of readjustment rights are two parts of a single statutory provision neither of which is subordinated to the other.

The Court of Appeals did not analyze these provisions as a consistent whole. It did not acknowledge that the scope of the right of readjustment is limited to that necessary "to meet materially changed conditions." It failed to consider the effect of its interpretation on the grant of indeterminate lease rights. Instead, the Court tore the "unless otherwise provided by law" clause out of context and gave it a construction that swallows up other statutory

and lease provisions. That course manifestly does not square with this Court's frequent injunction that two parts of a statute must be construed in harmony so that neither is subordinated to the other. *See, e.g., Weinberger v. Hynson, Westcott and Dunning,* 412 U.S. 609, 630-631 (1973); *Richards v. United States*, 369 U.S. 1, 11 (1962). Moreover, the Court of Appeals' reliance on the "otherwise provided by law" clause cannot be squared with the fact that, notwithstanding FCLAA's deletion of that clause, the Secretary continues to claim broad authority to readjust federal coal leases. *See, e.g.*, Solicitor's Opinion M-36939, 88 I.D. 1003 (1981).

Nor are those errors academic. Hundreds of federal coal leases were issued under the Mineral Leasing Act of 1920. *See* p. 7, *supra*. Those leases embrace hundreds of thousands of acres of federal land in fourteen states. *Id.* And billions of dollars have been invested by coal companies and public utilities in reliance on the rights granted under the Mineral Leasing Act of 1920. *Id.* Under those circumstances the Court should grant certiorari and reverse the decision of the Court of Appeals. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 506 (1980) (Court granted certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands.").

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND JUST COMPENSATION.

A. *Due Process.*

In 1983 Congress established the Commission on Fair Market Value Policy for Federal Coal Leasing to review the federal coal leasing program. Pub. L. 98-63, 97 Stat. 63. That commission, chaired by economist David F. Linowes and commonly referred to as the "Linowes Commission," examined, among other things, the basis for imposition of a 12-1/2 percent royalties on the value of coal mine by surface methods. *See* Report of the Linowes Commission, *Fair Market Value Policy for Federal Coal Leasing*, (Feb. 1984), at pp. 313-319. Based on hearings it held, including the testimony of some 90 witnesses; field examinations; and review of pertinent factual and legal materials that provided the foundation for FCLAA's enactment, the Linowes Commission found that there was no factual or economic basis for imposition of a 12-1/2 percent royalty for coal mine by surface methods; that it appeared to be more than happenstance that the 12-1/2 percent royalty is identical to that typically imposed for onshore federal oil and gas leases, notwithstanding that there are substantial differences in the oil and gas and coal industries; and that "there are major differences in the economics of coal mining among coal regions in the West and that a royalty rate reasonable for one area might not be reasonable for another." *Id.* The Linowes Commission concluded that, because a 12-1/2 percent royalty is excessive in all but extraordinary circumstances, the federal

government would be unable to issue any lease with such a royalty if it did not enjoy monopoly power through its ownership of public lands in the western United States. *Id.*

While the Secretary may be constitutionally permitted to impose a 12-1/2 percent royalty on new leases, it does not follow that he can constitutionally impose it on leases issued under the Mineral Leasing Act of 1920 and before FCLAA's enactment. Under the extraordinary circumstances that prevail here -- where petitioners' claims are based on the findings of a congressional commission and are not unsupported allegations made by those disenchanted with legislation -- the Secretary's actions satisfy neither the "arbitrary and irrational" test that the Court of Appeals improperly applied nor the stricter standard, mindful of the concern for impairing contracts between the United States and its citizens, that in fact governs. *See*, *e.g.*, *Perry*, 294 U.S. at 350-52; *National Railroad Passenger Corp. v. Atchison, Topeka, and Santa Fe Railway*, 470 U.S. at 471 n. 24; *Allied Structural Steel Corp. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978). Automatic application of a 12-1/2 percent royalty rate to petitioners' leases, with no consideration of the facts and circumstances, violates the due process clause of the Fifth Amendment.

B. *Taking.*

No set formula has been developed to identify a taking prohibited by the Fifth Amendment to the United States Constitution. *See*, *e.g.*, *Penn Central Transportation Co. v.*

New York City, 438 U.S. 104, 124 (1978). To aid in determining whether a taking has occurred, two factors have been identified as being particularly significant: (i) the economic impact of the law on the claimant and (ii) the extent to which the law has interfered with investment-backed expectation. *See, e.g.*, *Hodel v. Irving*, 107 S. Ct. 2076, 2082 (1987). Both factors suggest that a taking has occurred if the Court concludes, as petitioners contend, that the right of readjustment established by the Mineral Leasing Act of 1920 is not of unlimited scope *and* that, as the Secretary contends, FCLAA Section 6 requirements must be imposed when leases issued under the Mineral Leasing Act of 1920 are readjusted.

First, imposition of a 12-1/2 percent royalty will have a substantial economic impact on petitioners, their coal customers, and electric consumers. Royalty increases of 10 to 20 times or several dollars a ton -- increases that are unprecedented in the coal industry -- will result. *Second*, imposition of a 12-1/2 percent royalty would substantially interfere with investment-backed expectations. Petitioners and their coal customers have invested millions of dollars in reliance on the stability afforded by indeterminate leases, lease rights that no longer exist if the Secretary's actions are affirmed. Under those circumstances, a federal coal lessee must be compensated for conversion of the "indeterminate lease" rights it was granted, where leases may be readjusted only as necessary "to meet materially changed conditions," to "preferential lease" rights, where the Secretary can make any changes in lease terms he wishes -- including deciding not to extend the lease -- and

the lessee is vested only with a right of first refusal to accept whatever the Secretary offers. *See, e.g., Kaiser v. United States*, 444 U.S. 164, 178 (1979).

IV. THE COURT OF APPEALS TREATMENT OF THE TIMELINESS ISSUE CONFLICTS WITH THAT OF OTHER COURTS OF APPEALS AND THE DEPARTMENT OF THE INTERIOR AND CONSTITUTES AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals properly found that at the time petitioners' leases were readjusted, the Secretary employed a four-step process to readjust coal leases: (i) the Secretary issued a notice that lease terms would be readjusted, (ii) the Secretary issued Proposed Terms for examination by lessees, (iii) lessees could avail themselves of the right established under the Proposed Terms to object to provisions with which they did not agree, and (iv) the Secretary issued Final Terms after considering objections made by lessees to the Proposed Terms. App. A, 5a-6a. Petitioners contended that the Secretary's readjustment of the Colowyo and Peabody leases was untimely because the Secretary had not forwarded to them Final Terms (i) prior to the end of the readjustment period as required by the plain language of the Mineral Leasing Act of 1920 and the Tenth Circuit Court of Appeals' decision in *Rosebud*, 667 F.2d 949, and (ii), in the alternative, within a "reasonable time" after notice had been provided as required by the Tenth Circuit Court of Appeals decisions in *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 500 (10th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1987) and *Coastal Sates Energy Co. v. Hodel*,

816 F.2d 502, 505 (10th Cir. 1987) (collectively, "*FMC*"). The District of Columbia Circuit Court of Appeals held that the Mineral Leasing Act's requirement to readjust lease terms "at the end" of its period was ambiguous; that Congress has implicitly delegated to the Secretary the question when leases were timely readjusted; and that the Secretary had timely readjusted petitioners' leases because he had forwarded Proposed Terms -- not Final Terms -- within two years after notifying petitioners that their leases would be readjusted as provided by regulation, 43 C.F.R. § 3151.1(c) (1984). App. A, 20a-22a.

In their petition for certiorari for review of the same decision at issue here, Western Fuels-Utah, Inc. ("Western Fuels") contends that certiorari should be granted (i) to reconcile a conflict in Court of Appeals decisions on the timeliness issue and (ii) to address questions raised by the Court of Appeals' application of this Court's *Chevron* doctrine, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Petitioners agree with Western Fuels' arguments and contend that they demonstrate that petitioners' leases were not timely readjusted. The "reasonableness test" imposed by not only *FMC* but also by the Department of the Interior in its own decisions, *Atlantic Richfield Co.*, 99 IBLA 179 (1987); the anniversary date "deadline" standard imposed by *Rosebud*; and the "two-year" standard imposed by the Court of Appeals clearly conflict and should be reconciled. Moreover, invocation of *Chevron* should have resulted in the Court of Appeals embracing the plain language of the statute requiring readjustment no later than the twenty year anniversary date of the leases, not deference to the

Secretary's construction that forwarding Proposed Terms -- not Final Terms -- to a lessee within two years after notice satisfied statutory requirements. *See, e.g.*, *United States v. Locke*, 471 U.S. 84 (1985) (Owner of mining claims on federal lands required to file a notice with the Secretary on or before December 30 of each year because a statute required filing "prior to December 31"); *Hallstrom v. Tillamook*, 110 S.Ct. 304 (1989) (Claimant required to abide by 60 day notice provision established by statute). In light of the number of leases that were issued under the Mineral Leasing Act of 1920, the millions of dollars at issue, and the magnitude of the lands that could be affected, the Court should grant certiorari.

CONCLUSION

For these reasons petitioners urge the Court to grant certiorari in this case.

Respectfully submitted,

John F. Shepherd
Kenneth D. Hubbard
HOLLAND & HART
P.O. Box 8749
Denver, CO 80201
(303) 295-8000

Charles L. Kaiser
(Counsel of Record)
D.D. Mallard
DAVIS, GRAHAM & STUBBS
P.O. Box 185
Denver, Colorado 80201-0185
(303) 892-9400

APPENDICES

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Nos. 88-5417 through 88-5419.

WESTERN FUELS-UTAH, INC.,

Appellant,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

PEABODY COAL COMPANY, *et al.*,

Appellants,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

COLOWYO COAL COMPANY,

Appellant,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

Argued Dec. 12, 1989.

Decided Feb. 9, 1990.

Appeal from the United States District Court for the District of Columbia (Civil Action Nos. 87-02669, 87-01359 & 87-02325).

John F. Shepherd, Denver, Colo., with whom Kenneth D. Hubbard, Washington, D.C., for Peabody Coal Co., et al., Charles L. Kaiser, Denver, Colo., and Thomas P. Humphrey, Washington, D.C., for Colowyo Coal Co. were on the joint brief for appellants, in Nos. 88-5418 and 88-5419.

Charles F. Holum, Denver, Colo., with whom Edward Weinberg, Washington, D.C., was on the brief for appellant, Western Fuels-Utah, Inc. in No. 88-5417.

Jean A. Kingrey, Atty., Dept. of Justice, with whom Richard B. Stewart, Asst. Atty. Gen. and Robert L. Klarquist, Atty., Dept. of Justice, Washington, D.C., were on the brief for appellee in all cases.

William L. Slover and John H. LeSeur for the City of Colorado Springs, Colo., and Central Power & Light Co., Kenneth G. Lee, Washington, D.C., for Colorado-Ute Electric Ass'n, Inc., were on the joint brief for amici curiae urging reversal in all cases.

John R. McNeill and J. David Reed, Montrose, Colo., also entered appearances for amici curiae, Colorado-Ute Elec. Ass'n, Inc., in No. 88-5419.

Before WALD, Chief Judge, and EDWARDS and D. H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

The appellants in these consolidated cases hold leases granting them the right to mine coal on federal land. They

seek review of the district court's decision upholding the Bureau of Land Management's ("BLM") readjustments of their leases. The appellants challenge first the BLM's decision that it was compelled to apply the Federal Coal Leasing Amendments Act of 1976 ("FCLAA") to their leases, even though the leases were issued before 1976, and claim further that if the BLM had correctly interpreted FCLAA to apply to their leases, then the statute is unconstitutional. The appellants also challenge the timeliness of the lease readjustments. We affirm the district court's judgment sustaining the lease readjustments against all of these claims.

I. BACKGROUND

The Mineral Lands Leasing Act of 1920 ("MLLA"), 41 Stat. 437 (1920) (codified as amended at 30 U.S.C. §§ 181-287), authorized the Secretary of the Interior to lease federal lands for coal production. The Act dictated certain mandatory provisions to be included in the leases it authorized; in particular, it required that each lease provide for payment by the lessee of a royalty for not less than five cents per ton of coal extracted. § 7, 41 Stat. at 439. The Act provided that the term of a coal mining lease would be indeterminate, upon condition of diligent development and continued operation of the mine, and upon the further condition that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." *Id.*

In 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083 (1976) (codified as amended at scattered sections of 30 U.S.C.). Among the several concerns that led Congress to amend the MLLA was the low royalty lessees were paying for publicly owned coal. *See* H.R. Rep. No. 681, 94th Cong., 2d Sess. 17,

reprinted in 1976 U.S. Code Cong. & Admin. News 1943, 1953 [hereinafter 1976 House Report] ("the public is being paid a pittance for its coal resources"). Accordingly, Congress amended § 7 of the MLLA, 30 U.S.C. § 207, to provide:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from the lease. . . . A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as deffned by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

The appellants, Peabody Coal Company ("Peabody"), Colowyo Coal Company ("Colowyo"), and Western Fuels-Utah, Inc. ("Western Fuels"), are holders of federal coal leases issued before 1976. Each lease, in accordance with the MLLA, contained a clause reserving to the lessor a right of readjustment at twenty-year intervals. These clauses did not precisely track the words of the statute; they provided that the lessor reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

See Joint Appendix ("J.A.") 12, 36, 41, 75, 203.[1]

As the leases came due for their twenty-year readjustments after 1976, the Secretary, acting through the BLM, readjusted them to provide for payment of the 12.5% royalty fixed in § 207 (except in the case of Western Fuels' lease, for which a lower royalty was fixed because Western Fuels engages in underground mining), and also to provide that their subsequent readjustments would take place at ten-year intervals. The BLM expressly stated at the time of these readjustments and continues to maintain on this appeal) that is used the 12.5% royalty figure because § 207 required it to do so. *See, e.g.*, J.A. 26; Brief for Appellee at 21-22. The lessees, except Western Fuels, objected to the 12.5% royalty, but the BLM overruled these objections.

The lessees also objected to the timeliness of the procedure by which the BLM readjusted their leases. At the time of the lease readjustments in question, the BLM used a four-step process to readjust coal leases. The first step was that the BLM sent the lessee a Notice of Intent

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1 One of the leases at issue contained slightly different wording. It provided:

> It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

J.A. 165.

to Readjust the Lease ("NIRL").[2] This notice, a one-page letter, stated the date on which the lease became subject to readjustment; it also stated that the lease would be readjusted, and that the readjusted terms and conditions would be sent to the lessee within two years of the date of the NIRL. *See, e.g.,* J.A. 49. The second step was that the BLM sent the lessee the proposed readjusted terms and conditions of the lease. The third step was that the lessee could file objections to the proposed terms with the BLM. The last step was the BLM's ruling on the lessee's objections and imposition of the readjusted lease.

In all of the lease readjustments at issue, the BLM sent the lessee a NIRL prior to the lease's twenty-year anniversary date. The lease readjustment process, however, was not completed before the anniversary date in all of the cases. In the case of Western Fuels' lease, the BLM did not send the proposed readjusted terms until after the anniversary date. In all of the other cases, the BLM sent the NIRL and the proposed readjusted terms before the anniversary date, but with regard to some of the leases, the BLM did not rule on the lessee's objections to the proposed readjusted terms until after the anniversary date. In all the cases, the BLM sent the proposed readjusted terms within the period specified in the NIRL.

The lessees all appealed their readjustments within the Department of the Interior to the Interior Board of Land Appeals ("IBLA"), which upheld the mandatory application of § 207 to pre-1976 leases,[3] and found the lease readjustments to be timely. The lessees sought review of the IBLA decisions in district court, which consolidated the

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2 The terms used here to describe the steps in the BLM's procedure are not standardized BLM terms, but are simply used for clarity.

3 The term "pre-1976" is used throughout this opinion as shorthand for "prior to August 4, 1976," the effective date of FCLAA.

cases and granted the Secretary's motion for summary judgment in all of them. The lessees then brought the instant appeals.

II. THE APPLICABILITY OF SECTION 207 TO PRE-1976 LEASES

In deciding whether to uphold the BLM's decision to apply § 207 to pre-1976 leases, we begin by identifying the precise question at issue, and determine whether Congress has directly spoken to that question. If the intent of Congress with respect to the precise question at issue is clear, we must give it effect. *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984). In determining the intent of Congress, we must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 108 S. Ct. 1811, 1817, 100 L. Ed. 2d 313 (1988), and we must employ traditional tools of statutory construction, including, where appropriate, legislative history. *Ohio v. United States Department of the Interior,* 880 F.2d 432, 441 (D.C. Cir. 1989).

In the present cases, the question at issue is whether the mandatory lease terms provided in § 207 apply to pre-1976 leases when they come up for adjustment after 1976. The text of § 207 itself does not clearly answer that question. As amended by FCLAA, 30 U.S.C § 207 now provides in mandatory terms for a 12.5% royalty on coal leases. It does not, however, expressly provide that this royalty shall be imposed on pre-1976 leases; nor, on the other hand, does it expressly grandfather such leases from the imposition of this royalty.

The appellants claim that the absence of an express reference to pre-1976 leases in § 207 implies that such leases are exempt from the section's new, mandatory lease terms. The appellants observe that in other places,

FCLAA makes express reference to pre-1976 leases, thereby suggesting that Congress knows how to refer to such leases when it wants to affect them. However, one might equally well observe that when Congress wants to exempt existing arrangements from new statutory requirements, it knows how to include a grandfather clause. Indeed, one of FCLAA's express references to pre-1976 leases is in the nature of an exemption of such leases from certain of FCLAA's new, more exacting requirements.[4] If we were to draw any inference from this explicit reference, it would be that in the absence of such a reference in § 207, pre-1976 leases are not exempted from that section's requirements.

The government, by contrast, notes that FCLAA superseded that part of the MLLA that specified the mandatory royalty provisions of pre-1976 leases; the earlier royalty provision is no longer in the Act. Therefore, if the mandatory terms of FCLAA do not apply to pre-1976 leases, such leases would be subject to *no* mandatory royalty at all upon readjustment. Hence, the government concludes, the absence of any special reference to pre-1976 leases in FCLAA implies that the new terms of FCLAA must apply to them. This argument, too, is not preemptive; Congress could simply have trusted the Secretary to determine an appropriate royalty for pre-1976 leases without the guidance of a statutory minimum, just as there now is apparently no statutory minimum royalty for

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4 The reference is in § 3 of FCLAA, 30 U.S.C. § 201(a)(2)(A). This section was the result of the 1976 Congress' displeasure with federal coal lessees who were not mining coal, but who were holding onto coal leases for speculative purposes. *See* 1976 House Report at 14-15, 1976 U.S. Code Cong. & Admin. News at 1950-51. The section provides that the Secretary shall not issue a coal lease to any person who already holds one but who has not produced coal under that lease for a period of ten years. The section also provides, however, that in computing the ten-year period, the Secretary shall not count time prior to August 4, 1976.

coal covered by underground mining operations. The absence of a specific reference to pre-1976 leases in the new § 207 does not definitively decide the issue.

The appellants also observe that the new § 207 speaks of the "primary term of twenty years" of a coal lease. Pre-1976 leases, the appellants correctly observe, have no primary term, but are indefinite. However, we do not conclude from this that § 207 cannot apply to pre-1976 leases. As we shall see below,[5] Congress sometimes uses the word "term" to refer to the first twenty-year period in the life of a pre-1976 coal lease, even though, technically speaking, such leases are for an indefinite term. We think the phrase "primary term of twenty years" simply means the twenty-year period before a coal lease first becomes subject to readjustment, whether the lease was issued before or after 1976. Ultimately, therefore, the text of § 207 does not unambiguously answer the question of whether Congress intended FCLAA's new mandatory lease terms to apply to pre-1976 leases.

This is not, however, the end of the initial *Chevron* inquiry; we now turn to "the language and design of the statute as a whole," *see K Mart,* 108 S. Ct. at 1817, to determine whether congress expressed its intent on the question at issue. Looking outside § 207 to other sections of the statute, we find convincing evidence of § 207's scope.

30 U.S.C. § 203 allows holders of coal leases to modify their leases by adding contiguous or cornering lands to them. Such a modification creates a new lease, and if all lands covered by the new lease were immediately subject to the royalty provision of § 207, holders of pre-1976 leases would be understandably reluctant to add land to their leases. Section 302 therefore provides

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5 See infra note 7 and accompanying text.

> The minimum royalty provisions of section 207(a) of this title shall not apply to any lands covered by this modified lease prior to a modification until the term of the original lease or extension thereof which became effective prior to the effective date of this Act has expired.[6]

We find it impossible to make sense out of § 203 unless § 207 applies to pre-1976 leases. The quoted sentence clearly suggests that § 207's royalty provision will become applicable to all the lands in a modified lease at some time after the modification. The sentence must refer to a lease originally issued before 1976 but modified thereafter, for if a lease was originally issued after 1976, § 207 immediately applied to all of it. In providing that § 207 would apply to the lands covered by the original lease only after the original term or an extension thereof expires, § 203 necessarily assumes the application of § 207 to the pre-1976 lease at the readjustment date. Section 203 thus shows that the new mandatory lease terms

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6 This sentence was not added to § 203 until 1978. *See* 92 Stat. 2073, 2074 (1978). It is, however, now a part of the "statute as a whole" that we must interpret. We of course bear in mind "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n v. GTE Sylvania,* 447 U.S. 102, 117, 100 S. Ct. 2051, 2060, 64 L. Ed. 2d 766 (1980) (quoting *United States v. Price,* 361 U.S. 304, 313, 80 S. Ct. 326, 331-32, 4 L. Ed. 2d 334 (1960)). As *CPSC v. GTE Sylvania* explains, however, there is an important distinction between subsequent *legislation* and less formal types of subsequent legislative history. *Id.* at 118 n. 13, 100 S. Ct. at 2061 n. 13. It is proper for us to consider the new text of § 203 in our attempts to discern the meaning of the 1976 amendment to § 207; indeed, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* (quoting *Red Lion Broadcasting Co. v. FCC,* 396 U.S. 367, 380-81, 89 S. Ct. 1794, 1801-02, 23 L. Ed. 2d 371 (1969)).

apply to lands covered by a pre-1976 lease upon readjustment.[7]

The legislative history of § 203 confirms this reading.[8] The Senate Report states, "[a]ll leases would of course be subject to the provisions of the 1976 amendments at the expiration of their original lease term. [Section 203] does not affect this eventuality in any way." S. Rep. No. 1169, 95th Cong. 2d Sess. 7 (1978), 1978 U.S. Code Cong. & Admin. News 4736, 4740. Senator Melcher, a member of the Senate subcommittee responsible for the 1978 amendment to § 203, stated during the debates on the bill that "[t]he effect of the bill passed in 1976 was that, as [outstanding coal] leases became renewable at the end of 20 years, the terms of the lease would be changed to 12.5 percent royalty." 124 Cong. Rec. 30,369 (1978). Senator Haskell, chairman of the subcommittee, agreed. *Id.* Section 203 thus provides conclusive support for the Secretary's interpretation of § 207.

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7 The section also shows that Congress on occasion referred to the first twenty-year period in the life of pre-1976 coal lease as the "term" of that lease. As noted earlier, the term of a pre-1976 lease is, technically, indeterminate. But the word "term" cannot have that meaning in the quoted sentence from § 203, because if it did, the section's statement that § 207 does not apply "until the term of the original lease . . . has expired" would be tantamount to saying that § 207 would never apply, an interpretation of § 203 that would be absurd to impute to Congress. No would it make sense to speak of an "extension" of the original lease, as section § 203 does, if the original lease term were indeterminate. Section 203 therefore confirms our reading of the phrase "primary term of twenty years" in § 207 as applying to pre-1976 leases.

8 In keeping with *CPSC v. GTE Sylvania, see supra,* we have not given great weight to the legislative reports and floor statements accompanying the 1978 amendment to § 203. They merely confirm what the text of § 203 makes clear. *But see Bell v. New Jersey,* 461 U.S. 773, 784-86, 103 S.Ct. 2187, 2193-95, 76 L.Ed.2d 312 (1983) (giving "persuasive value," while interpreting a statute, to floor statements made during passage of a later amendment).

The appellants argue that when Congress was considering the 1978 amendment to § 203, it considered and rejected a floor amendment that would have amended the MLLS to provide expressly that pre-1976 leases would be subject to FCLAA's mandatory royalty rates upon readjustment. From the failure of Congress to enact this amendment, the appellants would have us conclude that Congress is at odds with the Secretary's interpretation of FCLAA. However, we are not convinced. In the first place, we think the appellants have misapprehended the purpose of the proposed amendment. It principally concerned those pre-1976 leases that had come due for readjustment but heat the Secretary had for some reason failed to readjust. The proposed amendment would have automatically subjected such leases to the 12.5% royalty. *See* 124 Cong. Rec. 30,369. The failure of Congress to impose the 12.5% royalty on leases for which readjustment had been waived does not establish any intent as to what the Secretary must do when he actually readjusted a lease; at most it suggests a reluctance to impose new terms on a lease once the time for readjustment has passed.

Moreover, even if the appellants were correct in saying that the purpose of the proposed amendment to the 1978 act was to codify the interpretation of FCLAA that the Secretary now espouses, its failure of passage does not mean that the Secretary's interpretation is wrong. The inference is just as natural that Congress believed the amendment was unnecessary because it simply restated existing law.[9] Drawing inferences from the failure of

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9 Indeed, a fuller history of the proposed floor amendment supports this probability. The Senate adopted the amendment and passed the bill as amended. 124 Cong.Rec. 30,372. The House passed a bill that was substantially identical to the Senate bill, except that (1) it treated differently the Secretary's authority to acquire existing leases by giving the lessees other lands in exchange, and (2) it did not contain the (continued...)

Congress to enact proposed legislation requires caution, *see, e.g., Advanced Micro Devices v. Civil Aeronautics Board*, 742 F.2d 1520, 1541-42 (D.C. Cir. 1984), and we should certainly not give more weight to the failure of Congress to enact the floor amendment than to the bill that Congress did enact, which, as discussed earlier, clearly shows that the Secretary's interpretation of § 207 is correct.

The appellants also argue that the 1976 FCLAA must be read in light of the history of federal coal leasing since 1920, and that the 1976 Congress must be presumed not to have intended to change the scheme of long-term lease stability created by the 1920 Congress.[10] The 1920 Congress, appellants argue, knew that coal mining requires

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9(...continued)
amendment adopted on the Senate floor. *See id.* at 33,281-82. The debate in the House focused on the exchange authority issue and did not even mention the Senate's floor amendment. *Id.* at 33,282-86. The Senate concurred in the House bill, after one Senator had discussed the difference in the two versions with regard to the Secretary's exchange authority, but without any discussion of the absence of the Senate's floor amendment. *Id.* at 36,703. It is thus quite likely that the failure to enact the Senate's floor amendment meant only that the Senate saw no purpose in taking on the House over a provision that simply restated existing law.

10 Indeed, appellants go further: they believe that the intent of the 1920 Congress should control the decision in this case. At oral argument, appellants made the surprising claim that the 1976 Congress could not impose a uniform 12.5% royalty on pre-1976 leases, even by express language in FCLAA, because to do so would be inconsistent with the intent of the 1920 Congress. We disagree with this argument. It is elementary that, within constitutional limits, a later act of Congress can alter rights granted under previous acts. If the 1976 Congress wished to dictate a 12.5% royalty rate for pre-1976 coal leases, only a constitutional bar could stop it from doing so. While we believe the federal coal leasing system created by the 1920 Congress is relevant insofar as it sheds light on what later Congresses were trying to do when they amended the MLLA, it is the intent of those later Congresses that must control our decision, unless implementation of that intent infringes constitutional rights.

large capital expenditures that a mining company would not be willing to make if it could obtain fixed lease terms for only twenty years, and so it created the indeterminate lease. However, even assuming, without deciding, that the 1976 Congress did not intend to break promises of stability made by the 1920 Congress, we find no evidence that the 1920 Congress made any promise that would preclude a later Congress from regulating the royalty for coal leases.

The 1920 MLLA provided that "at the end of each twenty-year period succeeding the date of [a coal] lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." 41 Stat. at 439. The Act put no upper limit on the royalty rate the Secretary might set upon readjustment; hence, even without FCLAA the Secretary would have had the power (though not the obligation) to fix a rate of 12.5%. It is clear, therefore, that Congress never promised that coal lessees would not be subject to such a rate.

The appellants argue, however, that although under the 1920 Act the Secretary could choose such a rate, and subsequent Congress could not direct the Secretary's choice by law. Drawing on excerpts from the legislative history of the 1920 Act, the appellants claim that Congress decided permanently to lodge the authority to readjust royalty rates in the Secretary. The history cited by the appellants, however, shows no more than that Congress, in 1920, was faced with the ordinary choice between dictating certain rates by statute and leaving them to the discretion of an administrative official.[11] Congress delegated authority,

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11 The appellants note, for instance, that after voting against a proposal that would have laid down in the statute the royalty rates to be paid for the first 35 years of coal lease and provided that the rates

(continued...)

within certain limits, to the Secretary, but retained, as usual, the power to circumscribe the Secretary's authority further at a later date. This is made doubly clear by the express provision in the 1920 Act that readjustments shall be as the Secretary may determine "unless otherwise provided by law," which brings us back full circle to the initial inquiry of what, if anything, the current law does provide as to pre-1976 leases. We see no reason, certainly, to think that the 1976 Congress felt any constraint against fixing a royalty rate of 12.5% for readjusted pre-1976 leases.

Finally, the appellants argue that it is not reasonable to conclude that Congress left the Secretary no discretion to impose a royalty rate of less than 12.5% on pre-1976 leases, because the 12.5% rate is simply too high in many cases. In this argument the appellants are joined by several *amici curiae*, who argue that the increased royalty rates will ultimately be borne by consumers of coal-generated power, and that the increase will be devastating and unfair to those power companies that built coal-fired generating facilities at great expense during the 1970's in response to the United States government's efforts to reduce the nation's dependency on foreign oil. The legislative history of FCLAA shows, however, that Congress was aware of this danger. Several members of the House Committee on Interior and Insular Affairs specifically warned the Congress that 12.5% was too high a figure, and that its imposition would result in higher consumer costs. *See* 1976 House Report at 57-58, 1976 U.S. Code Cong. &

11(...continued)
would thereafter be "as Congress may provide," one Congressman stated that coal mining was such an uncertain business that the best way to meet all possible contingencies was to leave the rates to the discretion of the Secretary. 51 Cong.Reg. 15,277-78 (1914). This statement simply reflects the uncertainty about dictating specifics that Congress felt in 1920. It hardly suggests a permanent abdication of Congress' power in the future to limit the Secretary's discretion.

Admin.News at 1981. Congress passed FCLAA anyway, and it is therefore not unreasonable to attribute to Congress a desire to impose the 12.5% royalty rate despite its likely effect on fuel costs.

In sum, we think § 203 clearly demonstrates that Congress intended § 207's 12.5% royalty rate to apply to pre-1976 leases as they come up for readjustment.[12] Accordingly, we uphold the Secretary's determination that he is bound to apply § 207's mandatory lease terms to pre-1976 leases.[13]

III. THE CONSTITUTIONALITY OF THE LEASE READJUSTMENT

A. *Takings Clause*

Appellants contend that if § 207 does, in fact, require the Secretary to readjust their leases for a 12.5% royalty, then the Act unconstitutionally takes their property without just compensation. Alternately, they say, the possibility that the Secretary's construction of the Act may operate unconstitutionally on pre-1976 leases should militate in

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12 The parties put forward, in addition to the evidence discussed so far, other excerpts from the legislative history of the 1976 FCLAA. We have carefully considered these references, but although some of them are suggestive, none provides any clear indication of the congressional intent as to the question in issue.

13 Our holding makes it unnecessary for us to comment on the appellants' argument that it would be inappropriate to defer to the Secretary's interpretation of § 207 because he is a party to the lease contracts at issue. Also, since we agree with the Secretary that he was compelled to apply § 207's 12.5% rate, we need not decide whether the doctrine of *SEC v. Chenery Corp.*. 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), would require reversal if we found the Secretary's action to be permissible but not compelled. *See Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948, 106 S.Ct. 313, 88 L.Ed. 294 (1985) (agency action cannot be upheld if it was based on mistaken belief that it was compelled by statute).

favor of a construction that avoids constitutional risk. We conclude that § 207, as applied to the leases before us, does not violate the Constitution.

The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation. The appellants claim that the Secretary's decision to impose a 12.5% royalty on all leases substantially interferes with their investment-backed expectation in an individualized determination by the Secretary on the proper royalty adjustment for each lease; the new royalty therefore amounts to an unconstitutional taking of property. Brief for Appellants Peabody and Colowyo at 41-42 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). While the appellants concede that their leases provide for readjustment at twenty-year intervals, they stress that most of the leases in question provide for *reasonable* readjustment. Such readjustments, they claim, can only be accomplished by individualized consideration of the particular circumstances surrounding each lease.

Most of the leases at issue provide that the lessor reserves

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

The constitutional question is whether this clause provides the lessees with rights that can be considered "property" subject to the protections of the Takings clause.

The readjustment clause ends with the phrase "unless otherwise provided by law at the time of the expiration of

any such period." It is not immediately clear which part of the readjustment clause this phrase modifies. It might, on the other hand, modify only the phrase "and thereafter at the end of each succeeding 20-year period during the continuance of this lease," meaning that lease readjustments would take place every twenty years, unless Congress by law required them to take place at some other interval. It might, on the other hand, modify the whole of the clause that precedes it, which would presumably mean that the lessor reserves the right to readjust the lease, except that Congress may provide by law that there shall be no readjustment. It might modify the phrase "reasonably to readjust," and thus mean that the lessor reserves the right reasonably to readjust the lease, except that Congress may provide by law for a specific readjustment of its choosing, even one that would have been unreasonable for the Secretary to make on his own under the prior law.

In choosing among the possible meanings of the readjustment clauses before us, we think the crucial point is that some of the constructions would immunize the leases from the sovereign power of the United States to change its laws. Such constructions are highly disfavored. The Supreme Court recently reminded us that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S. Ct. 2390, 2396-97, 91 L. Ed. 2d 35 (1986). The Court stated that the federal government has the duty to honor contracts that confer vests rights on private parties, but observed that "contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign," *id*. at 52, 106 S. Ct. at 2396-97 (internal quotation omitted), and that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority," *id*. at 52-53, 106 S. Ct. at 2396-97.

See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-148, 102 S. Ct. 894, 905-07, 71 L. Ed. 2d 21 (1982) (contract granting private party power to extract oil and gas from tribal land should not be construed to abrogate the tribe's sovereign power to impose a severance tax on extractions).

Applying this rule of construction to the lease contracts before us, we conclude that the leases reserve to Congress the power to provide by law for a specific readjustment.[14] The phrase "unless otherwise provided by law at the time of the expiration of any such period," though susceptible of multiple interpretations, is certainly susceptible of this one, which has the indisputable advantage of not foreclosing the exercise of sovereign authority. The leases here do not represent a surrender "in unmistakable terms" of Congress' power to change the law of federal coal leasing. Accordingly, we find that the pre-1976 leases did not give the lessees a vested right to reasonable adjustments by the Secretary on an individualized basis indefinitely into the future. A congressionally-mandated readjustment at the end of a twenty-year period therefore does not represent a taking in violation of the Takings Clause.

The lessees suggest that it would be inappropriate for this court, in construing the lease contracts, to defer to the interpretation of the readjustment clause suggested by the government, because it would, according to them, violate fundamental principles of contract law to let one party to a contract dictate its interpretation. We emphasize, therefore, that in construing the lease contracts we are *not* deferring to the BLM's interpretation. We are, rather, applying the rule of construction laid down by the Supreme Court, that one who wishes to obtain a contractual right

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14 This conclusion applies *a fortiori* to the one lease at issue for which the readjustment clause does not contain the word "reasonably." *See supra*, note 1.

against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms. We have no occasion in these cases to comment on whether it would be appropriate to defer to the government's interpretation of a contract between it and a private party, where the question of interpretation did not involve the limiting of the government's sovereign authority.

B. *Due Process*

The appellants also claim that the imposition of a 12.5% royalty violates Due Process, on the ground that Congress had no basis on which it could find such a rate to be reasonable, as purportedly required by the leases. The appellants note that a congressional commission recently concluded that 12.5% is an excessive royalty rate for coal leases. Brief for Appellants Peabody and Colowyo at 40-41. This claim is meritless. Given our conclusion that Congress had the power to provide by law for such lease readjustments as it saw it, we cannot strike down Congress' choice of a 12.5% rate simply because we might think it unwise or improvident. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 2d 563 (1955).

IV. THE TIMELINESS OF THE LEASE READJUSTMENTS

The MLLA and the leases in question provide that the leases may be readjusted "at the end" of each twenty-year period following their issuance. According to the appellants, the United States waives the right to readjust a lease unless it completes the readjustment prior to the anniversary date of the issuance of the lease. Appellants Peabody and Colowyo argue that a readjustment is not complete until the Secretary rules on the lessee's objections to proposed lease terms; appellant Western Fuels argues that a readjustment is certainly not complete until the Secretary sends the lessee the proposed lease terms. The

Secretary argues that he may complete readjustment of a lease after the anniversary date provided he sends the lessee a Notice of Intent to Readjust the Lease ("NIRL") prior to the anniversary date, and sends the readjusted terms within the time specified in the NIRL.

Chevron again controls our decision. We conclude without difficulty that the Act does not clearly address the question of precisely when the Secretary must perform a lease readjustment. The appellants argue that "at the end" is a precise term and must be given its precise meaning. Brief for Appellant Western Fuels at 11. Their argument in essence is that the phrase "at the end" means "before the end." They offer no persuasive reason, however, why it should have that meaning, and they certainly do not convince us that it must have that meaning. To give the statutory phrase its literal meaning would be to say that the United States waives its ability to readjust a coal lease unless it performs the readjustment on the very day the lease expires, a result Congress could hardly have intended.

The statutory provision that a lease may be readjusted "at the end" of each 20-year period is capable of bearing other interpretations. It could mean, for instance, that negotiations concerning the new lease terms should begin on or about the anniversary date of the original lease. It could be intended to govern only the effective date of a readjusted lease, and to impose no requirements as to when the readjusted terms should be determined. In short, we think Congress implicitly delegated to the Secretary the task of determining the timing of the procedures by which he would readjust coal leases. *See Chevron*, 467 U.S. at 843-45, 104 S. Ct. at 2781-83.

We therefore inquire whether the Secretary's interpretation of the statute is reasonable and consistent with the statute's purpose. *See id.* We conclude that it is. The Secretary's procedure of sending a NIRL prior to the lease's anniversary date, and the proposed terms within a

time specified in the NIRL, provides the lessee with what it legitimately needs: a date by which it can tell whether its lease will be readjusted. No lessee before us can claim that it was unfairly surprised by the lease readjustment, or that it took action in reliance on the legitimate belief that its lease would not be readjusted. We therefore conclude that the Secretary's procedure satisfied the timeliness requirements of the statute.[15]

V. CONCLUSION

For the foregoing reasons, we find no infirmity in the BLM's readjustments of the appellants' coal mining leases. The judgment of the district court is accordingly

Affirmed.

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15 In his brief, the Secretary states that for a lease readjustment to be timely, the BLM need only send a NIRL prior to the lease's anniversary date, and later transmit the proposed lease terms within the time specified in the NIRL. Brief for Appellee at 22-23. There is some question as to whether this is indeed the interpretation of the statute embodied in the Secretary's own readjustment regulations in force at the time of the readjustments at issue. One section of those regulations at least suggests that the proposed lease terms must be sent before the anniversary date. *See* 43 C.F.R. § 3451.1(c)(1) (1983). However, no party before this court has raised an issue as to the meaning of the regulations.

Appellant Western Fuels argues that its lease readjustment did not conform to an internal policy, adopted by the BLM in late 1984, of sending the notice of proposed lease terms at least six months before the anniversary date of a lease. However, even assuming that the Department's internal decision was the sort of mandatory agency policy upon which the public is entitled to rely, *see, e.g. Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977), it was not adopted until well after the time appellant's lease was readjusted.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1359 (TPJ)

PEABODY COAL COMPANY AND MATERIAL SERVICE CORPORATION,
Plaintiffs,

v.

DONALD P. HODEL, Secretary of the U.S. Department of Interior,
Defendant

Civil Action No. 87-2325 (TPJ)

COLOWYO COAL COMPANY,
Plaintiff,

v.

ROBERT R. BURFORD, Director of the Bureau of Land Management, U.S Department of Interior,
Defendant

Civil Action No. 87-2669 (TPJ)

WESTERN FUELS-UTAH, INC.
Plaintiff,

v.

DONALD P. HODEL, Secretary of the U.S. Department of Interior,
Defendant

FILED
OCT 11 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the cross-motions of the several plaintiff-coal companies and the defendant Secretary of the Interior for summary judgment in these consolidated cases, it appearing that the cases are substantially identical to two cases decided the same date by the United States Court of Appeals for the Tenth Circuit, *FMC Wyoming Corporation v. Hodel*, 816 F.2d 496 (10th Cir. 1987) and *Coastal States Energy Company v. Hodel*, 816 F.2d 502 (10th Cir. 1987), and no sufficient reason having been shown this Court why it should depart from the Tenth Circuit's rulings therein, for essentially the reason set forth by the Tenth Circuit in the cases aforesaid, it is, this 11th day of October, 1988.

ORDERED, that the motions of plaintiffs Peabody Coal Company, et al. (Civ. No. 87-1359), Colowyo Coal Company (Civ. No. 87-2325) and Western Fuels-Utah, Inc. (Civ. No. 87-2669), for summary judgment are denied; and it is

FURTHER ORDERED, that the motions of the defendant Secretary of the Interior for summary judgment are granted, and the complaints are dismissed with prejudice.

/s/Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

(6)

No. 89-1958

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLOWYO COAL COMPANY, ET AL., PETITIONERS

v.

MANUAL LUJAN, JR.,
SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
ALBERT M. FERLO, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

Petitioners entered into leases to mine coal on federal land pursuant to a statute that provided for readjustment at twenty-year intervals of the terms of such leases "as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods," 30 U.S.C. 207 (1970). The questions presented are:

1. Whether the property of petitioners was taken without due process of law or just compensation when the Secretary increased the royalties on the leases to conform to the law in effect at the expiration of a twenty-year period.

2. Whether the government's right to readjust the terms of a federal coal lease is waived if the government has provided the lessee with the proposed readjusted terms before the end of the twenty-year period specified in 30 U.S.C. 207(a), but has not finally ruled on the lessee's objections to those terms until after the end of the twenty-year period.

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In the Supreme Court of the United States

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No. 89-1958

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MANUAL LUJAN, JR.,
SECRETARY OF THE INTERIOR

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 895 F.2d 780. The order of the district court (Pet. App. 1b-2b) is unreported. The decisions of the Interior Board of Land Appeals (IBLA) are unreported. See C.A. App. 30-33, 69-71, 93-97, 118-122, 143-147, 186-189.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. Chief Justice Rehnquist granted petitioners an extension of time through June 7, 1990, to file their petition. The petition for a writ of certiorari was filed on June 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Colowyo Coal Company (Colowyo), Peabody Coal Company, North Antelope Coal Company, and Powder River Coal Company (collectively Peabody), obtained leases from the Department of the Interior under Section 7 of the Mineral Leasing Act (MLA), 30 U.S.C. 207, to mine coal on federally owned lands in various locations in Colorado and Wyoming.[1] The leases were all granted "for indeterminate periods upon condition of diligent development and continued operation of the mine or mines * * *." 30 U.S.C. 207 (1970). Section 7 also required the Secretary to condition the leases upon payment of a minimum production royalty of five cents per ton. *Ibid.* Finally, Section 7 provided that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods." *Ibid.*[2]

With respect to the leases at issue in this case, the most recent twenty-year periods ended in 1984-1986. See C.A. App. 10, 34, 73, 98, 123, 161. At that time, regulations pro-

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[1] Peabody obtained five leases, one in 1964, two in 1965, and one in 1966, which was later subdivided into two additional leases. Colowyo obtained one lease in 1924.

[2] Each of the leases contained provisions concerning readjustment. With some variation (see Pet. App. 5a n.1), they generally provided that the government reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Pet. App. 4a.

vided that the government must issue a notice of intent to readjust prior to the expiration of the current twenty-year period. See 43 C.F.R. 3451.1(c)(1) (1984). Notice of the proposed terms had to be received by the lessee "as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice." 43 C.F.R. 3451.1(c)(2) (1984). The readjustment was generally effective 60 days after the lessee received the proposed terms. *Ibid.* The lessee could, however, appeal the terms of the readjustment, 43 C.F.R. 3451.2(d) (1984). See also 43 C.F.R. Pt. 4 (1984) (prescribing procedure for appeals to Interior Board of Land Appeals).

2. Prior to the twenty-year anniversary of each of petitioners' leases, the Bureau of Land Management (BLM), Department of the Interior, notified petitioners that it intended to readjust the leases. Pet. App. 6a. BLM's notification indicated that the adjustments were intended to reflect new leasing provisions enacted by Congress in the Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. Pet. App. 5a. Section 6 of the FCLAA, 30 U.S.C. 207, which replaced Section 7 of the MLA, provided for a minimum royalty of 12.5% of the value of coal mined. It also continued to provide for readjustments to the leases at the end of the primary term of twenty years and every ten years thereafter.[3]

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[3] The amendment provides in relevant part:

> (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by

Both petitioners informed the BLM that they objected to the new terms. C.A. App. 20, 56, 83, 106, 131, 172. The BLM overruled the objections, and petitioners appealed to the IBLA. C.A. App. 23-29, 63-68, 89-92, 106-111, 137-142. The IBLA affirmed the BLM's decisions in relevant part. C.A. App. 30-33, 69-71, 93-97, 118-122, 143-147, 186-189.

3. Colowyo and Peabody sought review of the IBLA decisions in the District Court for the District of Columbia, which consolidated the two cases with a similar case filed by Western Fuels-Utah, Inc. Pet. App. 6a.[4] In a brief order, the district court granted the government's motion for summary judgment (Pet. App. 1b-2b), holding that the cases were "substantially identical" to *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), and *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502 (10th Cir. 1987). Pet. App. 1b.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that the Secretary properly interpreted the FCLAA to require that the 12.5 per cent royalty rate be applied to petitioners' leases when the twenty-year readjustment period expired, even though those leases predated the FCLAA. Pet. App. 9a-16a. The court observed that the FCLAA's language amending Section 7 did not provide

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> underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. 207. The statute permits royalty rates lower than 12.5% only for "coal recovered by underground mining operations." The mines at issue in this case are surface mines. Pet. App. 5a.

[4] Western Fuels-Utah has filed a separate petition for certiorari, which is currently pending. See *Western Fuels-Utah, Inc.* v. *Lujan*, No. 89-1728.

an unambiguous answer to the question whether Congress intended the new minimum royalty rates to apply to pre-FCLAA leases. See Pet. App. 9a. However, the court found that other statutory provisions – in particular, a provision expressly referring to the applicability of the minimum royalty provisions of Section 7 to pre-existing leases – made Congress's intent in this regard clear. Pet. App. 10a-11a. The court's review of the statute's legislative history confirmed that the new minimum royalty rates were to apply to pre-existing leases when they were readjusted. Pet. App. 11a-13a.

With respect to petitioners' taking claim, the court noted that Section 7 of the MLA as originally enacted provided for readjustment of leases "as the Secretary * * * may determine, *unless otherwise provided by law*" at the expiration of the twenty year period. 30 U.S.C. 207 (1970) (emphasis added). The court found that the italicized phrase "certainly" could be understood to mean that Congress intended to reserve to itself "the power to provide by law for a specific readjustment," an interpretation that "has the indisputable advantage of not foreclosing the exercise of sovereign authority." Pet. App. 19a. Because the pre-1976 MLA, far from giving petitioners "a vested right to reasonable adjustments by the Secretary on an individualized basis indefinitely into the future," in fact put petitioners on notice that Congress could by statute raise the royalty at the expiration of any twenty-year period, no taking had occurred. *Ibid.*

The court also rejected petitioners' due process argument, holding that it would be inappropriate for a court to strike down Congress's choice of a 12.5% minimum rate simply on the basis of arguments that it was "unwise or improvident." Pet. App. 20a. Finally, the court rejected petitioners' claim that the readjustments in this case were not timely. Pet. App. 20a-22a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 9-12) that the decision of the court of appeals in this case announced a "new legal principle" (Pet. 9) governing enforcement of contracts between the sovereign and private parties. Petitioners argue that the alleged "new legal principle" conflicts with this Court's decisions delineating the scope of Congress's authority to change the terms and conditions of a contract between the sovereign and a private party.

a. In *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), this Court reiterated the basic principles governing contractual relationships between the United States and private parties. The Court stated:

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those

> to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147.

442 U.S. at 52. In *Bowen*, the Court noted the importance of heeding "this Court's often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." 477 U.S. at 52-53.

Far from announcing a new principle of contract interpretation, the court of appeals in this case simply followed *Bowen* and numerous earlier precedents. The court noted that the statutory phrase, "unless otherwise provided by law at the time of the expiration of [any twenty-year] period," is echoed in petitioners' original, pre-FCLAA leases.[5] Pet. App. 17a-18a. Because it is certainly possible to interpret the statutory language to preserve "the sovereign power of the United States to change its laws" (Pet. App. 18a), and because any other interpretation could foreclose exercise of sovereign authority and would thus be "highly disfavored" (*ibid.*), the court correctly concluded that the statute should be read to permit Congress to enact new minimum royalty rates that can be applied when pre-existing leases are readjusted.

2. Petitioners also contend (Pet. 13-14) that the court of appeals misconstrued the statute by failing to give full effect to all provisions of the MLA in deciding that the

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[5] Quoting a phrase from the legislative history of an early version of the MLA dating back to 1914, six years before the MLA was enacted, petitioners repeatedly state that the terms of coal leases under the MLA were to be readjusted only "as necessary to meet materially changed conditions." Pet. 4 (internal quotations omitted). See also Pet. 5, 8, 13, 17. Although the need to adapt to "materially changed conditions" may well have been one reason why Congress included provision for readjustment of lease terms in the statute, the quoted language was not a part of the MLA as enacted. This language from a committee report cannot reasonably be construed to vest rights in petitioners that are beyond the power of Congress to alter.

FCLAA governed the lease adjustments in question. Petitioners argue that the lower court's failure violates this Court's "frequent injunction that two parts of a statute must be construed in harmony so that neither is subordinated to the other." *Ibid.* Petitioners' contention, which has been squarely rejected by the only other appellate court that has addressed the issue, see *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 500-502 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), is meritless.[6]

The court of appeals carefully and methodically reviewed the provisions of both the MLA and the FCLAA in order to ascertain the effect of the FCLAA on the MLA. See Pet. App. 9a-16a. Indeed, the court expressly followed this Court's directive in *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988), that its construction of the statute must "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Petitioners present no reason for rejecting the court of appeals' analysis of Section 7's neighboring provision that plainly refers to the application of the new minimum royalty rates to pre-existing leases (Pet. App. 10a-11a), nor do they confront evidence to the same effect in the FCLAA's legislative history. See Pet. App. 11a-13a.

3. Petitioners renew their contentions that the application of the statutory minimum royalty to their leases constitutes a deprivation of property without due process of law and a taking of their property without just compensation. Pet. 16-18.

a. Petitioners' claim (Pet. 16) that a "stricter" standard of due process review should be applied to impairment by

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[6] The Court has recently denied certiorari in another case raising essentially the same issues, in which the Tenth Circuit, following *FMC*, denied claims indistinguishable from those urged by petitioners here. See *East Texas Steel Facilities, Inc.* v. *Lujan*, 110 S.Ct. 65 (1989).

the government of its own contractual obligations than to legislative action that impairs private contracts has no relevance to this case.[7] Petitioners' leases, as well as the MLA itself, made clear that new terms and conditions would be applied at twenty-year intervals in accordance with the law applicable at the time of readjustment. Therefore, the government's actions in full compliance with those provisions did not impair the obligation of any contract or deprive petitioners of any property interest, and this case does not raise any question concerning the appropriate standard of review when such an impairment is present.

Petitioners' "due process" argument therefore reduces to the claim that the FCLAA was an unwise exercise of Congress's power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Congress's power under this clause is very broad. See *United States* v. *California*, 332 U.S. 19, 27 (1947); *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940). As the court of appeals noted, the fact that petitioners believe the FCLAA to be "unwise or improvident" does not provide a basis for declaring it unconstitutional. Pet. App. 20a (citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955)).[8]

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[7] This Court has reserved the question whether and under what circumstances such a heightened standard of review would apply. See *National R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 471 & n.24 (1985).

[8] The MLA's minimum royalties of five cents per ton were in effect from 1920 until 1976. In enacting the FCLAA, Congress decided to replace this low, constant-dollar royalty with an *ad valorem* percentage royalty that would automatically increase federal revenues as the price of coal increased. The fact that a commission appointed to look into the matter (see Pet. 15-16) may have disagreed with Congress's decision does not render that decision unreasonable, much less violative of the due process clause.

b. Petitioners' taking claim is also without merit. To determine whether challenged government action constitutes a taking, a court must examine "the economic impact of the regulation, *its interference with reasonable investment backed expectations*, and the character of the governmental action." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1980) (emphasis added). Because the readjustments here took place in conformance with petitioners' leases, as well as with the MLA as originally enacted and long-settled law concerning the interpretation of government contracts, any investment-backed expectations with which the readjustments interfered could not have been "reasonable."[9] See *Bowen*, 477 U.S. at 55-56.

4. Petitioners finally argue (Pet. 18-20) that the decision of the court of appeals concerning the timeliness of the readjustments conflicts with the decisions of other courts of appeals that have construed the same provision of the MLA. Petitioners note that the same issue was presented in the companion petition for a writ of certiorari filed by Western Fuels-Utah. See note 4,[10] *supra*. In addition to suffering from the defects discussed in the government's brief in opposition in *Western Fuels-Utah*, petitioners' argument has an additional flaw. Unlike Western Fuels-Utah, which was not informed of the precise terms of its readjusted lease until shortly after the twenty-year anniversary date, petitioners were informed of the proposed terms of readjust-

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[9] A lessee who believes that an adjusted royalty rate was unreasonable or impaired its operations has the option of seeking a royalty reduction under 30 U.S.C. 209. Neither petitioner here has sought such a reduction. Their taking claim would therefore in any event be unripe. See *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 351-353 (1986); *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981).

[10] We have provided a copy of our brief in opposition in *Western Fuels-Utah* to petitioners.

ment *before* their twenty-year anniversary dates. The *final* terms of readjustment were not determined prior to the anniversary dates only because petitioners' objections to the proposed terms had first to be considered by the BLM and their subsequent appeal adjudicated by the IBLA. Insofar as there was any delay in this case, therefore, it was due to an event entirely within petitioners' own control—*i.e.*, their decision to file objections and appeal the Secretary's determination. In any event, petitioners' claims are identical to those rejected by the only other circuit that has addressed the issue. See *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 500 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988); *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502, 504-505 (10th Cir. 1987). See also note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
ALBERT M. FERLO, JR.
Attorneys

AUGUST 1990

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* The Solicitor General is disqualified in this case.

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(7)

No. 89-1958

IN THE
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OCTOBER TERM, 1989

COLOWYO COAL COMPANY,
PEABODY COAL COMPANY, *et al.*,

Petitioners,

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MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

CHARLES L. KAISER
(Counsel of Record)
D.D. MALLARD
DAVIS, GRAHAM & STUBBS
P.O. Box 185
Denver, CO 80201
(303) 892-9400

JOHN F. SHEPHERD
KENNETH D. HUBBARD
HOLLAND & HART
P.O. Box 8749
Denver, CO 80201
(303) 295-8000

Counsel for Petitioners

Dated: September 7, 1990

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IN THE

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

In response to the brief in opposition, petitioners respectfully submit the following reply.

First, the Secretary's formulation of the "Questions Presented" does not fairly represent the issues before the Court. Resp. Br. at I. The Secretary's articulation is silent on two issues raised by the petition and tortures two others. Compare Resp. Br. at I with Pet. at i. The four questions identified in the petition clearly present grounds for granting certiorari. Pet. at i.

Second, the Secretary does not dispute the practical effect of the decision below.[1] Resp. Br. at 7. The Court of Appeals holding that every federal contract deemed ambiguous must be interpreted as reserving in Congress the unrestricted power to change contract terms in the exercise of its "sovereignty" has the effect of making federal contracts binding on private parties while leaving the government free to modify contracts at will through Congressional action. Pet. at 10-11. The issue in this case is whether federal contracts grant vested rights in private parties or whether, as the Secretary contends, Congress can alter those rights whenever it wishes, without fear of encroaching on property rights. It is not about proper application of one of dozens of rules of construction.

Third, the Secretary suggests that he need not be concerned with construing the reciprocal sections of the Mineral Leasing Act that grant federal coal lessees

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1 The Secretary discusses at length the issue of whether the Court of Appeals established a new principle of federal contract law or merely applied *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). It is the effect of the decision, however characterized, that impacts petitioners, and the Secretary does not deny that effect.

indeterminate leases and reserve in the federal government the power to readjust those leases because the former is without content and the latter is without limitation. Resp. Br. at 7. Neither contention stands. The Mineral Leasing Act vested federal coal lessees with unique indeterminate lease rights because Congress believed such grants were necessary to provide lessees with long-term security, given the inherent risk and capital-intensive character of the coal mining industry. *See*, *e.g.*, Pet. at 4-6; 51 Cong. Rec. 1495 (1914). However, because indeterminate leases could remain outstanding for scores of years and because the relative positions of the federal government and lessees would likely change over that time, the Mineral Leasing Act also provided that the federal government could readjust lease terms at periodic intervals to reflect "materially changed conditions" as necessary to "adjust each case according to the conditions that are present, having due regard for markets, transportation, and other conditions." *Id.* These limitations do not appear merely in "an early version of the MLA dating back to 1914, six years before the MLA was enacted" as the Secretary contends; they were repeatedly recognized by Congress throughout the six years of sustained debate that preceded enactment of the Mineral Leasing Act and, consequently, restrict the federal government's power to readjust federal coal leases. *See*, *e.g.*, H.R. Rep. No. 17, 64 Cong., 1st Sess. 3, 4 (1916); H.R. Rep. No. 668, 68 Cong. 2d Sess. 3, 4 (1914); Pet. at 4-6. The Court of Appeals' construction of the Mineral Leasing Act tears one of two reciprocal statutory rights from context in contravention of the clear and consistent direction of this Court. Pet. at 13-14.

Fourth, the Secretary mischaracterizes the constitutional issues before the Court. Petitioners' due process claim rests on a foundation that is unprecedented -- in contrast to the typical case where legislation is challenged on the speculative ground that it is unreasonable, here an independent commission appointed by Congress concluded, after months of investigation, weeks of interviewing approximately one hundred witnesses, and days of hearings, that Congress had no rational basis to impose twelve and one-half percent royalties on federal coal lessees. This state of affairs is far different from the Secretary's characterization that a commission merely "disagreed" with Congress. Resp. Br. at 9 n.8. Moreover, it is undisputed that petitioners invested hundreds of millions of dollars in reliance on the indeterminate lease rights the Secretary granted; the suggestion that those investments could not have been "reasonable" because indeterminate lease rights were, in fact, ephemeral all along is unworthy of the Secretary. Resp. Br. at 10.

Fifth, the Secretary's argument on the question whether petitioners' leases were timely readjusted approaches the disingenuous. The Secretary's failure to timely readjust petitioners' federal coal leases cannot be justified on the ground that petitioners invoked mandatory administrative appeal rights to contest decisions they believed to be erroneous. Resp. Br. at 11. Moreover, contrary to the Secretary's suggestions, the two courts of appeals that have addressed the timeliness question have announced differing legal tests that will produce disparate results in hundreds of federal coal lease readjustments. *See, e.g.*, Pet. at 18-19; *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505

(1987); *Colowyo Coal Company v. Lujan*, Pet. App. 20a-21a.

CONCLUSION

For the reasons stated in the petition and in this reply, petitioners pray the Court to grant certiorari in this case.

Respectfully submitted,

Charles L. Kaiser
(Counsel of Record)
D.D. Mallard
DAVIS, GRAHAM & STUBBS
P.O. Box 185
Denver, Colorado 80201-0185
(303) 892-9400

John F. Shepherd
Kenneth D. Hubbard
HOLLAND & HART
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8000

Counsel for Petitioners

September 7, 1990

(3)

No. 89-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLOWYO COAL COMPANY AND PEABODY COAL COMPANY,
Petitioners,

v.

MANUEL LUJAN, JR., SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia**

BRIEF OF COLORADO-UTE ELECTRIC ASSOCIATION, CITY OF COLORADO SPRINGS, COLORADO AND CENTRAL POWER AND LIGHT COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM H. BURCHETTE
(Counsel of Record)
KENNETH G. LEE
JORDEN SHULTE
& BURCHETTE
1025 Thomas Jefferson St, N.W.
Washington, D.C. 20007
(202) 625-5628

Attorneys for Colorado-Ute Electric Association

WILLIAM L. SLOVER
JOHN H. LESEUR
SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for City of Colorado Springs, Colorado and Central Power & Light Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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This *amici curiae* brief is submitted in support of the petition for a writ of certiorari. Petitioners and Respondent have consented to the filing of this brief. *Amici* appear on behalf of their electric customers and rate-payers.

INTEREST OF THE AMICI

Colorado-Ute Electric Association ("CUEA") is an electric generation and transmission cooperative cre-

ated pursuant to the Rural Electrification Act of 1936, as amended. 7 U.S.C. §§901-950 (1982). Through its 14 member distribution cooperatives, CUEA serves nearly 200,000 consumers (representing a population of approximately 600,000 persons) in primarily rural service areas covering parts or all of 49 of Colorado's 63 counties (representing almost two-thirds of the area of the State of Colorado). CUEA was organized in 1941, and began electric utility operations in 1959, so that its distribution cooperative members, who serve rural families and businesses, could obtain a reliable and economical source for their electric power needs. The City of Colorado Springs, Colorado ("Colorado Springs"), located in central Colorado, owns and manages a non-profit generation, transmission and distribution network serving residential and industrial customers in the Colorado Springs area. Central Power & Light Company ("CP&L"), a subsidiary of Central and South West Corporation, is a generation, transmission and distribution company serving a 44 county area in southern Texas with a population of approximately 1.25 million persons and containing over 200 cities and towns.

Coal mined by the Petitioners from federal leases is purchased by *Amici* pursuant to long-term purchase agreements.[1] These agreements contain royalty pass-

[1] CUEA's long term purchase agreement with Colowyo is for approximately 1,500,000 tons of federal coal per year until 2017. CUEA will also purchase federal coal from Peabody in amounts averaging 700,000 tons per year until the year 2004. Colorado Springs will purchase approximately 550,000 tons per year from Colowyo until the year 2004. CP&L will purchase approximately 1,500,000 tons per year from Colowyo until the year 1994.

through provisions requiring that *Amici* reimburse Petitioners for federal coal royalties or any increases therein paid by Petitioners. At the time *Amici* executed their long-term purchase agreements, the federal coal royalty assessed on Petitioners' coal production, and passed-through to *Amici*, equalled 20 cents per ton. Petitioners' existing coal leases limited the power of the Secretary to raise royalties to reasonable adjustments necessary to reflect materially changed conditions. Despite these lease provisions, in the mid-1980's, the Secretary of the Department of the Interior, citing the provisions of the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083, readjusted Petitioners' federal coal leases and imposed the 12.5 percent *ad valorem* royalty rate applicable to new leases issued after 1976 on Petitioners' existing pre-1976 leases. Due to the pass-through nature of these increases, *Amici* now are liable for royalty costs of \$3.30 to 3.65 per ton of coal. Over the life of their coal supply contracts, *Amici* calculate that this increase will cost their cooperative members and rate-paying customers a combined total of \$240 million; nationally, *Amici* project a total royalty-based price increase for electric customers of approximately \$2 billion over the next ten years. The annual increase in royalties imposed on CUEA exceeds the total margin (profit) earned by CUEA in any year of its existence. These huge increases are both unfair and unlawful.

The unfairness of Interior's actions is self-evident. In the 1970's, when *Amici* were preparing to expand generating capacity, elimination of dependency on foreign oil and natural gas and the increase in the use of coal was a top domestic priority of the Nixon, Ford

and Carter Administrations.[2] Congress responded by enacting a series of laws prohibiting utility use of certain fuels, such as natural gas, and directing utilities to use, or increase their use of, alternative fuels—primarily coal.[3] At tremendous expense, *Amici* and other utilities throughout the West, Midwest and Southwest built large coal-fired generating facilities. These large facilities required massive amounts of capital. CUEA spent over one billion dollars to build its mine-mouth coal-fired generating facilities at Craig Station Units 1,2 and 3 near Craig, Colorado which have a combined capacity of 1,200,000 kilowatts. These facilities were financed through the use of Ru-

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[2] *See, e.g., President Nixon's Energy Message to Congress*, (April 18, 1973), *Energy Mgmt.* (CCH) ¶ 504 at 506-507 (1973) ("I urge that highest national priority be given to expanded development and utilization of our coal resources." *Id.*); *President Ford's Energy Message to Congress* (February 26, 1976), *Energy Mgmt.* (CCH) ¶ 701 at 687 (March 9, 1976) ("Coal must be used increasingly as an alternative to scarce, expensive or insecure oil or natural gas supplies." *Id.*); *President Carter's Energy Address* (April 18, 1977) (The energy crisis "is unprecedented in our history;" America must declare the "moral equivalent of war" in response; and "[w]e can protect ourselves from uncertain supplies . . . by making the most of our abundant resources such as coal." *Id.*).

[3] *See, e.g., Emergency Petroleum Allocation Act of 1973*, Pub. L. No. 93-159, 87 Stat. 627 (1973); *Federal Non-nuclear Energy Research and Development Act of 1974*, Pub. L. No. 93-577, 88 Stat. 1878 (1974); *Energy Reorganization Act of 1974*, Pub. L. No. 93-438, 88 Stat. 1233 (1974); *Energy Supply and Environmental Coordination Act of 1974*, Pub. L. No. 93-319, 88 Stat. 246 (1974); *Energy Policy and Conservation Act*, Pub. L. No. 94-163, 89 Stat 871 (1975); *Energy Conservation and Production Act*, Pub. L. No. 94-385, 90 Stat. 1125 (1976); and *Powerplants and Industrial Fuel Use Act of 1978*, Pub. L. No. 95-620, 92 Stat. 3289 (1978).

ral Electrification Administration and National Rural Utilities Cooperative Finance Corporation loans and loan guarantees. CP&L spent over $250 million to build its 601,000 kilowatt facility at Coleto Creek, Texas. Colorado Springs spent over $110 million for the construction of its coal-fired facility near Fountain, Colorado. Given the costs of developing a western, low-sulfur coal strip mine, coal companies—such as Petitioners—could not obtain commercial financing until utilities—such as *Amici*—contractually agreed to purchase specified tonnages over long periods. Utilities such as *Amici*, in turn, expected reasonable certainty as to the future costs of the coal purchased, and certainly never anticipated that in addition to their multi-billion dollar investments in coal and coal facilities, the Federal Government would endeavor to extract billions of additional dollars by "readjusting" the federal coal royalty.

Amici have been injured by the Federal Government's unilateral decision to supercede existing lease terms. At the time *Amici* entered into their long-term coal supply contracts with Petitioners, the Secretary of the Department of the Interior had by regulation consistently construed his power to readjust coal lease terms as limited to fact-specific changes needed to meet "materially changed conditions." The Secretary has replaced the required regulatory analysis with the mechanistic imposition of a royalty rate totally divorced from any analysis of existing economic conditions. Had the Secretary examined economic conditions for western Colorado coal, he would have discovered the high cost associated with mining that coal,[4] the lack of alternative markets for that

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[4] Because Colorado's federal coal reserves are relatively costly

coal, the lack of alternative supplies for electric generating facilities, the fragile condition of the coal mining industry and the western Colorado economy and the financial conditions of *Amici* as principal purchasers of this coal. All of these factors demonstrate the complete irrationality of imposing a 12.5 percent royalty on existing leases.

ARGUMENT

CONGRESSIONAL EXERCISE OF SOVEREIGN POWER TO ABROGATE CONSIDERATION DUE UNDER A CONTRACT BETWEEN THE UNITED STATES AND PETITIONERS VIOLATES PRINCIPLES OF DUE PROCESS AND JUST COMPENSATION AND WRONGFULLY FRUSTRATES THE REASONABLE EXPECTATIONS OF *AMICI*

This case presents important issues regarding those principles that govern contracts with the Federal Government for the development of federal resources: Does the Secretary of the Interior or the Congress have the power to abrogate unilaterally the provisions of a federal coal lease and thus deprive the lessee and those in privity with the lessee of the reasonable business expectations contained in that lease? If the Secretary of the Interior or the Congress possesses that power, can it be exercised with impunity, unrestrained by principles of Due Process or Just Compensation?

The Court below held that Congress, in the exercise of its "sovereignty", could abrogate the compensation terms of a contract to which the United States was

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to mine, the *ad valorem* percentage royalty rate results in a much higher royalty than that for coal from areas with low mining costs, such as the Powder River Basin in Wyoming.

a party without implicating either Due Process or Just Compensation considerations and that, if any ambiguity existed in the coal lease contract, it must be resolved so that such power was preserved. D.C. Cir. Slip Opinion, reprinted at Petitioners App. A, 17a - 20a.[5] The Court of Appeals' reasoning leads to a legal paradox. On the one hand, in order to effect the royalty change proposed here, the Federal Government must resort to its power as sovereign. On the other hand, however, the Court of Appeals found that the Federal Government did not impinge Due Process or Just Compensation despite taking from the lessees a substantial value of their leases through exercise of that sovereignty.

In essence, the Court of Appeals gives the Federal Government all the benefits of sovereignty with none of the obligations or limitations. *Amici* are injured by the irresponsible exercise of this sort of sovereignty since they are contractually obligated to pay for any royalty increases[6] and are therefore the economic party in interest. The Petitioners' property right is comprised of the lease rights to extract and sell fed-

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[5] The Court of Appeals' suggestion that "if one who wishes to obtain a contractual right against the sovereign" that is immune from this sort of abrogation, then one "must make sure that the contract confers such a right in unmistakable terms." D.C. Cir. Slip Opinion, Petitioners App. A, 20a, is illusory. Federal coal leases are very much contacts of adhesion to which the prospective lessee can neither add nor subtract terms or conditions.

[6] When agreeing to this term and condition in their coal supply contract with Petitioners, *Amici* justifiably assumed that the royalty readjustments would be consistent with long-standing administrative precedent and would not create an uncompensated taking.

eral coal upon the payment of a fixed royalty. The Court of Appeals has held the Congress and the Secretary may take additional value from the Petitioners regardless of the terms and conditions of Petitioners' leases. Execution of the provision in the lease setting the amount to be paid for the lease rights is not an exercise of Congress' power as sovereign; rather it is Congress' exercise of its proprietary powers. Hence, *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130 (1982), concerning a Tribe's *taxing* power (an attribute of sovereignty) relied upon by the Court of Appeals to uphold the unilateral change in the royalty rate (*i.e.*, the consideration received under the contract), is inapposite.

A court must engage in a higher level of review where the Federal Government modifies its own contractual obligations. Rights against the United States arising out of a valid contract are protected under the Fifth Amendment and cannot be annulled unless pursuant to the "federal police power or some other paramount power." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Further, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977). The Court of Appeals' construction of these federal coal leases allows Congress to exact greater compensation unilaterally. Moreover, the Court below in sanctioning the Federal Government's conduct in this matter, has wholly disregarded the reasonable expectations of *Amici* and Petitioners. At the time *Amici* decided to build their coal-fired plants, and to contract with Petitioners, the Government had established a settled policy of royalty rate adjustment

over a number of decades and with respect to hundreds of coal leases. *Amici* do not quarrel here with the government's right to specify a 12.5 percent royalty rate for *new* federal coal leases. Parties entering into such leases or purchasing the coal from them do so with fair warning of the economic facts of life. No such "fair warning" was given to *Amici*. *Amici*, and parties similarly situated, built reasonable expectations on the continued effect of federal policy regarding royalties found in pre - 1976 coal leases.[7] The government's change in established policy unlawfully and substantially deprives Petitioners of their property interest in their leases and frustrates the reasonable business expectations of parties such as *Amici*. The Court of Appeals has effectively held that whenever the Federal Government grows dissatisfied with its bargain or the compensation received under a valid, long-term contract, it simply may unilaterally change the compensation, apparently to any amount it desires.[8] Not only does the Court of Appeals endorse this sort of Federal action, but it treats such conduct as a protected aspect of sovereignty, immune from Due Process or Just Compensation considerations. The Court erred by not imposing on the Federal Government the important procedural strictures guaranteed by the Fifth Amendment.

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[7] Again, *Amici* do not object to reasonable increases in coal royalties for materially changed conditions; for example, to keep pace with inflation. However, the increases of nearly 2000 percent in the federal royalties paid by *Amici* go far beyond the bounds of reasonableness.

[8] The Court's conclusion is at odds with its own precedent in *Fox v. Ickes*, 137 F.2d 30 (D.C. Cir. 1943), *cert. denied*, 320 U.S. 792 (1943) (Secretary enjoined from raising price for water received under existing reclamation contract).

We respectfully urge this Court to review the decision below, for the reasons set forth herein and those advanced by Petitioners, and to consider the important question of whether Congress may use its power as sovereign to amend contracts entered into pursuant to its proprietary powers without restraint of the Fifth Amendment.

CONCLUSION

This Court should grant Petitioners' request for a writ of certiorari to review the D.C. Circuit's decision.

Respectfully submitted,

WILLIAM H. BURCHETTE
(Counsel of Record)
KENNETH G. LEE
JORDEN SHULTE
& BURCHETTE
1025 Thomas Jefferson St, N.W.
Washington, D.C. 20007
(202) 625-5628

Attorneys for Colorado-Ute Electric Association

WILLIAM L. SLOVER
JOHN H. LESEUR
SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for City of Colorado Springs, Colorado and Central Power & Light Company